COASTAL OIL AND GAS CORP.

IBLA 94-302 Decided September 10, 1997

Appeal from a decision of Deputy State Director, Lands and Minerals, New Mexico State Office, Bureau of Land Management, upholding, as modified, a Notice of Incidents of Noncompliance. SDR 94-004 (INC No. NM-O47JED001).

Reversed.

1. Oil and Gas Leases: Incidents of Noncompliance

The BLM may not issue a Notice of Incidents of Noncompliance to an oil and gas lease operator for failure to comply with Notice to Lessees and Operators of Federal and Indian Oil and Gas Leases-2B by not obtaining BLM's approval for the disposal of wastewater produced from an oil and gas well when BLM has already approved the Application for Permit to Drill that well, including a surface use plan for the disposal of such water and other operations. In such circumstances, if BLM desires the operator to specify the disposal method or to submit other information required by Notice to Lessees and Operators of Federal and Indian Oil and Gas Leases-2B, it must first, consistent with past agency practice, request that information.

APPEARANCES: Carl F. Baker, Esq., Houston, Texas, for the Coastal Oil and Gas Corporation.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

The Coastal Oil and Gas Corporation (Coastal) has appealed from a December 9, 1993, Decision of the Deputy State Director, Lands and Minerals, New Mexico State Office, Bureau of Land Management (BLM), upholding, as modified, on State Director Review (SDR) pursuant to 43 C.F.R. § 3165.3(b), a Notice of Incidents of Noncompliance (INC) No. NM-O47JED001 issued by the Oklahoma Resource Area Office, BLM, on October 7, 1993.

The INC cited Coastal with a "major" violation of 43 C.F.R. § 3162.1, because it had failed to obtain BLM's approval, as required by Onshore Oil and Gas Order No. 7 (Order No. 7), 58 Fed. Reg. 47353 (Sept. 8, 1993), for

the disposal of wastewater produced by its oil and gas lease operations at the State Park USA Well No. 1 situated in the Bob West Field in Starr County, Texas. 1/ The BLM required Coastal to get such approval no later than October 27, 1993. Coastal promptly complied, but also sought SDR. 2/

In his Decision on SDR, the Deputy State Director upheld issuance of the INC, modifying the basis for the cited violation from Order No. 7 to Notice to Lessees and Operators of Federal and Indian Oil and Gas Leases-2B (NTL-2B), 40 Fed. Reg. 57814 (Dec. 12, 1975), because, as Coastal had properly noted in seeking SDR, NTL-2B was still in effect at the time of issuance of the INC. Further, the Deputy State Director rejected Coastal's principal argument that approval of its Application for Permit to Drill (APD), including its surface use plan (SUP), constituted BLM's approval for the disposal of produced water:

> Coastal did not have written approval pursuant to NTL-2B * * *. A proper application for NTL-2B approval must contain the information required by the applicable Sections II, III, or IV of NTL-2B.
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> The SUP did not contain the information needed for BLM to approve the disposal method. The information supplied in the SUP is vague regarding the use of State approved disposal facilities. The method used (i.e., lined pit, unlined pit, or subsurface injection) is not mentioned. Therefore, the approval of the SUP is inadequate in meeting the requirements of NTL-2B.

(Decision at 2.) The Deputy State Director agreed, however, that the violation was "minor," under 43 C.F.R. § 3163.1(a), and modified the INC accordingly. 3/

1/ Only the bottom-hole location of the well is situated on public lands, within Federal oil and gas lease NM-A 42853 (TX).

2/ In addition to requesting SDR, Coastal filed with BLM on Oct. 16, 1993, a Sundry Notices and Reports on Wells (Sundry Notice), specifically seeking approval for the disposal of produced water from the State Park USA Well No. 1 and various other wells in the Bob West Field, by trucking it from the wells and then injecting it into an approved salt water disposal well operated by South Texas Disposal, Inc., under State Permit No. 05800, in the Exsun (Queen City II-A) Field in Zapata County, Texas. A copy of the State permit, approved by the Director, Underground Injection Control, Oil and Gas Division, Railroad Commission of Texas, on Jan. 22, 1986, was submitted with the Sundry Notice. The Notice was approved by the Chief, Branch of Fluid Operations, New Mexico, BLM, on Oct. 28, 1993.

3/ A "minor" violation is defined by 43 C.F.R. § 3160.0-5(l) as "noncompliance that does not rise to the level of a major violation," which itself is defined by 43 C.F.R. § 3160.0-5(j) as "noncompliance that causes or threatens immediate, substantial, and adverse impacts on public health and safety, the environment, production accountability, or royalty income."

[1] Regulation 43 C.F.R. § 3162.3-1(d) provides that, in order to obtain BLM's approval of drilling operations, including any surface disturbing activity, an oil and gas lease operator is required to submit an "administratively and technically complete" APD 30 days prior to the desired date for commencing operations. Such an application is said to consist of a completed Form 3160-3 and several attachments, including a "surface use plan of operations containing information required by paragraph (f) of [43 C.F.R. § 3162.3-1] and appropriate orders and notices." 43 C.F.R. § 3162.3-1(d)(2). Regulation 43 C.F.R. § 3162.3-1(f), in turn, provides that "[t]he surface use plan of operations shall contain information specified in applicable orders or notices, including the road and drillpad location, details of pad construction, methods for containment and disposal of waste material, plans for reclamation of the surface, and other pertinent data as the authorized [BLM] officer may require." (Emphasis added.)

Regulation 43 C.F.R. § 3162.3-1(f) put operators on notice that, in order to file acceptable SUP's, they must submit information regarding the method for the disposal of waste material, as specified in "applicable orders or notices." On appeal, BLM and Coastal agree that the applicable order or notice, at the time of issuance of the INC at issue here, was NTL-2B.

The NTL-2B required that an operator obtain BLM's written approval for the disposal of produced water, either by injection into the subsurface, placement in a lined pit, or "other acceptable method[]." 40 Fed. Reg. 57814 (Dec. 12, 1975); see 43 C.F.R. § 3162.5-1(b); Harvey E. Yates Co., 139 IBLA 120, 124 (1997); Craig McGriff Exploration, Inc., 132 IBLA 365, 368 n.2 (1995). In order to obtain such approval, the Notice also stated:

> Any application to dispose of produced water must specify the proposed method of disposal and provide the information necessary to justify the method. Required information which must be included in applications for approval of produced water disposal in the subsurface, in lined pits, or in unlined pits is set forth in sections II, III, and IV, respectively, of this notice.

40 Fed. Reg. 57814 (Dec. 12, 1975). In the case of subsurface injection, the operator was required to furnish certain information, including the designated name and number of the proposed disposal well and its location, the daily quantity and quality of produced water, the injection formation and interval, and the depth and areal extent of all usable aquifers. 40 Fed. Reg. 57814-15 (Dec. 12, 1975). The NTL-2B also required specific information in the case of lined and unlined pits. See 40 Fed. Reg. 57815 (Dec. 12, 1975). Regulation 43 C.F.R. § 3162.1, which was cited by BLM in its INC, requires an operator to comply with an NTL.

Finally, 43 C.F.R. § 3163.1(a) requires that BLM issue an INC, specifying corrective action and an abatement period, "[w]henever an * * * operator fails * * * to comply with the regulations in [43 C.F.R.] [P]art [3160] * * * or the requirements of any notice or order."

In the present case, Coastal sought BLM's permission to drill the State Park USA Well No. 1 by filing, pursuant to 43 C.F.R. § 3162.3-1, an APD, along with "Supplemental Information to Application for Permit to Drill" (Supplemental Information), on June 17, 1992. In addition to setting forth additional information regarding its proposed drilling and casing program, Coastal stated in its Supplemental Information, at page 4, under the heading "Surface Use Program," that "[p]roduced waste water will be confined to a storage tank and hauled from the location to a state approved disposal facility." Coastal did not identify the specific disposal facility or even the type of facility and the method of disposal. It did not submit any of the information required by NTL-2B. Nonetheless, BLM approved the APD, including the SUP, on September 2, 1992.

In his December 1993 Decision, the Deputy State Director concluded, despite Coastal's argument to the contrary, that approval of its APD, including the SUP, did not constitute BLM's approval for the disposal of produced water. We disagree.

Along with its APD, Coastal submitted the required SUP. If BLM was then of the opinion that the SUP "did not contain the information needed for BLM to approve the disposal method," in accordance with NTL-2B, as the Deputy State Director later asserted in his December 1993 Decision, it should not have approved the APD. Rather, it could have, pursuant to 43 C.F.R. § 3162.3-1(h), returned the application and advised Coastal that it could not be approved until the necessary information was supplied or that it was delaying any action on the application until Coastal did so. The fact that BLM did not require the submission of additional information and approved the APD without reservation on September 2, 1992, we conclude, was apparently based on BLM's conclusion, however wrong or mistaken, that Coastal's SUP satisfied 43 C.F.R. § 3162.3-1(f) and NTL-2B.

Considering the facts in this case, we find no justification for BLM to issue an INC on October 7, 1993, for Coastal's failure to obtain BLM's approval for the disposal of produced water, since such approval had already been obtained. The Deputy State Director in upholding the INC, finds that approval of an APD, including an SUP, constitutes the approval required by NTL-2B, except in this instance, since Coastal's application did not contain the information required by 43 C.F.R. § 3162.3-1(f) and NTL-2B. The fact that the application was not complete when approved cannot now be used to retroactively cancel BLM's approval, especially since it was BLM's responsibility, prior to approval, to ensure that Coastal's APD fully comported with 43 C.F.R. § 3162.3-1(f) and NTL-2B. Under the circumstances, we hold that BLM improperly issued the INC pursuant to 43 C.F.R. § 3163.1 for failure to comply with the requirements of NTL-2B.

We do not imply that BLM is barred from seeking additional information about operations methods once an APD is approved. A procedure to do so was already in place. The Deputy State Director admitted that, "[i]n cases like this, BLM normally notifies the operator of the missing information by letter rather than by an INC." (Decision at 2; see Craig McGriff Exploration, Inc., 132 IBLA at 366.) He sought to justify issuance of an INC on the following basis: "Coastal has drilled numerous Federal wells in this

area for which they were required to file for NTL-2B approval. Coastal was aware of the requirement to submit additional information." (Decision at 2.)

Coastal does not dispute the fact that it was aware of the NTL-2B requirement that it provide specific information regarding the method for disposing of produced water and related matters. Indeed, Coastal is deemed to have constructive knowledge of that requirement by virtue of its publication in the Federal Register on December 12, 1975. 44 U.S.C. § 1507 (1994); Robert L. Payne, 107 IBLA 71, 73 (1989).

However, whatever Coastal knew or is deemed to have known at the time it submitted its APD, including its SUP, the fact is that BLM approved that application and thus authorized the disposal of the water thereafter produced from its proposed well, without obtaining the detailed information required. That would not, however, preclude BLM from obtaining submission of any and all of the information required by NTL-2B at a future time. But, consistent with its reported past practice, BLM should have sent a letter to Coastal requesting the essential information. We can find no justification for BLM to deviate from that practice. As we said in Coastal Oil & Gas Corp., 135 IBLA 6, 8 (1996), Coastal, an oil and gas lease operator with previous experience in dealing with BLM in like matters, was "entitled to rely upon consistent past agency practice in such cases." Under the circumstances, BLM should have initially issued a letter requesting the necessary information. Id. This is especially so since BLM had already approved Coastal's APD, including its SUP.

We therefore hold that the Deputy State Director, in his December 1993 Decision, improperly upheld, INC No. NM-O47JED001, issued for Coastal's failure to obtain BLM's approval for the disposal of produced water from the State Park USA Well No. 1.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is reversed.

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Gail M. Frazier
Administrative Judge

I concur:

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David L. Hughes
Administrative Judge